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IS A DIVORCE GRANTED IN THE UNITED STATES VALID IN ENGLAND?

The late case of Briggs v. Briggs[1] held that a divorce decreed in Kansas, by a court of competent jurisdiction, in conformity with the laws of Kansas, would not be recognized in England, on the authority of Lolley's Case,[2] that "no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii* for grounds on which it was not liable to be dissolved *a vinculo matrimonii* in England."

In viewing this case two facts should be remembered, first that in England prior to 1858 the courts could only grant *a mensa et thoro* and parliament *a vinculo matrimonii* divorce, and since that date the divorce court has had both of these powers; second, the Scotch courts always decreed divorces *a vinculo* between parties present in Scotland without reference to the domicil of the parties or to the place where the marriage was contracted.[3] About 1812, the Scotch courts granted Lolley a divorce *a vinculo* whilst at the time Lolley and his wife were English subjects, married and domiciled in England. Lolley subsequently entered into a second marriage in England, and was then indicted for polygamy and pleaded the Scotch divorce, but was nevertheless convicted, and on error, all the judges of Sergeant's Inn Hall were unanimously of the opinion that the conviction was right, and that a foreign divorce of an English marriage granted on grounds not recognized in England, was not valid in England.[4] The correctness of the report of this case was the next year questioned,[5] and subsequently Lord Bannatyne[6] observed that the facts in issue in Lolley's Case furnished no basis for such an adjudication, and Lord Brougham, who participated in Lolley's Case, observed in Warrender v. Warrender,[7] that the decision in Lolley's Case was not put upon any special circumstance, and only applied to a case where the parties were married and domiciled in England.

The next case after Lolley's, involving this question, was McCarthy v. Decaix,[8] in which the marriage had been celebrated in England, the husband a Dane and the wife an Englishwoman, and after marriage they went to Denmark, where they were domiciled and divorced. The question was whether the Danish divorce was valid in England so as to affect property rights in England against her personal representatives, she having returned to, and died in England. Lord Eldon hesitated, and observed that Lolley's Case did not settle or establish as a general rule that a foreign divorce was not valid in England; but Lord Brougham, who finally decided this case, without adverting to the difference in the facts, decided that the Danish divorce had no force in England; yet the weight of this is taken away by the observations of the same judge in the subsequent case of Warrender v. Warrender.[9]

During the same year the case of Conway v. Beazley[10] was decided, and although the parties were married and domiciled in England, but divorced in Scotland, Dr. Lushington held that Lolley's Case did not establish the rule that an English marriage could not be dissolved in a foreign country, but did establish the rule that persons domiciled in England could not be divorced by a foreign court, and that up to the time of this decision a case had not arisen wherein the marriage occurred in England and the parties subsequently became actually *bona fide* domiciled in another country and there obtained the divorce. In 1835 Warrender v. Warrender[11] arose, in which the marriage was celebrated in England, the husband Scotch and the wife English. The parties domiciled in Scotland, and subsequently became domiciled in Eng-

[1] 11 Cent. L. J. 46.
[2] Rex v. Lolley, Russ. & Ry. 237.
[3] Sinclair v. Sinclair, 1 Hag. Con. 294; Hosack, Confl. Laws, 257; 1 Burge Col. & For. Laws, 670; 2 Kent Com. 110; Gordon v. Pye, 3 Eng. Ec. 430; Geils v. Giels, 1 McQ. Scotch App. Cas. 255.
[4] Rex v. Lolley, Russ. & Ry. 237.
[5] Tovey v. Lindsay, 1 Dow. 117, 127.
[6] In Duntze v. Levet, Ferg. 403; 3 Eng. Ec. 506.
[7] 2 Cl. & F. 488.
[8] 2 Russ. & Myl. 614; 2 Cl. & F. 568, note; 3 Hag. Ec. 642, note; 5 Eng. Ec. 244.
[9] 2 Cl. & F. 488.
[10] 3 Hag. Ec. 639; 5 Eng. Ec. 242.
[11] 2 Cl. & F. 488.

land, where a separation by deed took place. The wife went abroad, and the husband to Scotland, where he commenced proceedings for a divorce; the wife appeared and objected to the jurisdiction, which was overruled, and she appealed to the House of Lords, where the appeal was dismissed, on the ground that the House of Lords must decide according to the law of Scotland, which was that the Scotch tribunals had jurisdiction and *a fortiori* could decree a divorce, although it was questionable whether the parties had abandoned their English domicil.[12] This was approved by Lord Lyndhurst and Lord St. Leonards.[13] At the same time it was held that marriage was a *status*; that decrees relating thereto were deemed to be *in rem*,[14] and when pronounced by a tribunal of competent jurisdiction, binding upon the courts of every other country.[15] Although the jurisdiction to dissolve an English marriage was not conceded.

Lord Nottingham[16] considered it against the law of nations not to give credit to foreign decrees of divorce, and Sir Wm. Scott[17] approved the same doctrine; but subsequently Cockburn, C. J., considered the question difficult and unsettled.[18] Since the creation of the divorce court in England it has been decided that the English courts should recognize a foreign divorce when granted on a ground sufficient in England for such divorce, and when the parties are domiciled in the country where the divorce was granted.[19] And in the latter case Lord Penzance stated that the true rule was that persons who have become *bona fide* domiciled in a foreign country, having resigned their English domicil, should by the English law be permitted to resort to the tribunals of their [illegible]micil. The House of Lords in 1860 committed[20] itself to the doctrine, "that a suit to dissolve the marriage tie should be entertained only by the courts of the country in which the parties whose marriage is sought to be dissolved are *bona fide* domiciled, according to the well known law by which the succession to movable estate is regulated in case of intestacy."

The true doctrine, supported by reason and universally recognized in the United States, having as much if not more English authority as Lolley's Case for its support, is that "the law of the place, of the actual *bona fide* domicil of the parties, gives jurisdiction to grant divorce, without reference to the law of the place where the marriage was celebrated, or to the place where the offense was committed."[21] The reason assigned[22] why the English tribunals did not recognize the power of a foreign court to dissolve an English marriage was that at that time the laws of England did not allow a judicial, but did a parliamentary dissolution of the marriage, and the parties were presumed to have agreed, when contracting matrimony, never to be separated by any judicial authority, and that parties married in England must be taken the world over to have bound themselves to live until death or an act of parliament "them do part." This reason is not tenable. If a marriage indissolvable by the *lex loci* is to be held indissolvable everywhere; so conversely, a marriage dissolvable by the *lex loci* must be held everywhere dissolvable. The principle is the same in both propositions, and the result is that a marriage indissolvable in England cannot be dissolved in Scotland; and as all marriages are dissolvable in Scotland no matter where contracted, they must be dissolvable in England; and if solemnized in Prussia, where incompatibility is cause for divorce, the marriage should be dissolved for that cause in England; and if there were a country where marriage could be dissolved by agreement of the parties, such dissolution should be recognized in England. The principle adopted in Lolley's Case that dissolubility or indissolubility of a marriage must be determined by the *lex loci contractus*,

[illegible]) Bligh. N. S. 138; 2 Cl. & Fin. 556.

[illegible]ails v. Dickinson, 17 Jur. 423; 20 Eng. L. & Eq. 10.

Yelverton v. Same, L. R. 1 H. L. 218; Mordaunt v. Same, L. R. 2 P. & M. 109; 2 Taylor, Ev. § 1488.

[15] Story, Confl. Laws, § 594; Kenn's Case, 7 Co. 42; Harfield v. Harfield, 20 How. St. Tr. 395; Duchess of Kingston's Case, 2 Sm. L. Ca. 446; 1 Ves. Sr. 157; 2 Ves. Sr. 246; 7 Eng. Ec. 438; L. R. 1 P. & M. 237; 2 Swab. & T. 160.

[16] In the year 1748. See 2 Swans. 326.

[17] In 1798, Roach v. Gorvan, 1 Ves. Sr. 159; 4 Eng. Ec. 414.

[18] Forster v. Same, 4 B. & S. 198; 116 Eng. C. L.

[19] Shaw v. Gould, L. R. 3 H. L. 55; Shaw v. Att'y Gen'l, L. R. 2 P. & M. 161.

[20] Fraser Confl. Laws, 10.

[21] Story, Confl. L. § 230; Hosack, Confl. L. § 286; Burge, Col. & For. Laws, 190.

[22] Warrender v. Same, 2 Cl. & Fin. 488; Edmonstone v. Lockhart, 3 Eng. Ec. 389, 9 Bligh. 89.

is not supported by reason, or the weight of English authority; because marriage is not a contract but a *status*,[23] in this, that it can only be assumed as the *lex loci* commands, and when assumed third parties and the State are affected; and being a *status* it is not a matter of allegiance,[24] that being a mere personal service which a *status*, not being a person, can not perform. It is also self-evident that every sovereign government has the power to determine the *status* and define the civil rights and capacities of all persons within its borders, and *a fortiori*, compelled to recognize a person as married or single according as he is one or the other in his domicil,[25] which brings the conclusion that a marriage valid by the laws where celebrated is valid everywhere.[26] If this is logical, then the *lex loci domicilii* governs the dissolubility, and the *lex loci contractus*, the validity of the marriage relation.

THE SHREWD MAN OF BUSINESS AND THE COURTS OF COMMERCIAL CITIES.

In Stevens v. Rainwater, 4 Mo. App. 292, the St. Louis Court of Appeals, after adjudging perhaps correctly that the defendant was not guilty of the deceit charged, said: "That he acted like a man of business is no impeachment of his fairness; nor does it give the appellant any claim upon a court of equity, that he was of unequal capacity, and that the transaction has resulted unfavorably to him. The maxim that equality is equity, does not imply that courts of chancery will regulate the results which arise from the varying degrees in which men possess shrewdness and the qualities which go to make up a talent for practical affairs." If this language merely expressed that courts of equity will enforce the rules of a plain and substantial honesty only, and not the tenets of the casuist, there would be nothing objectionable in it, for such is the law; but it goes further. The shrewd man of business and his talent for practical affairs are mentioned in a way to cause that dangerous character to swell with pride, and to lessen his fear of the courts. If his triumph over his opponent "of unequal capacity" is permitted, it should be tolerated only, not approved. He should be repressed, not encouraged; for the courts of commercial cities, in which he most abounds, have already allowed to his activities a range far too wide for the safety of classes of citizens better than himself.

The nature of the occupations of a large portion of a city's population, and the conditions of city life, by which so much that is desirable which money can procure is daily passed in review before them in the most alluring shapes, create in many a purpose to speedily become rich, and as a consequence the community is familiarized with numerous ways of making money that are not altogether honest. So many men of talent and energy resort to these ways, and are so skilful in partially concealing them, or in giving them mild names when not concealed, and through them in many instances reach such great success, that the voice of censure is in a measure silenced, and it has become difficult to get even the courts of the cities to view their transactions in the true light. These men call themselves men of business, and pride themselves upon their craftiness. They are that class of business men who are never better than this estimate of them by Sir Egerton Brydges (Life of Milton, p. 56): "To make a man of business requires nothing but petty and watchful observation, cold reserve and selfish craft; to catch the moment when caution in others is asleep; to raise hopes, yet promise nothing; to seem to give full information, yet to be so vague that everything is open to escape." They are found in every pursuit, but mostly in those of commerce. Their higher orders reach commanding positions in the business and social world. They are numerous, powerful and influential, but their sole object is success; and destitute of principle, they are restrained, so far as restrained at all, only by the fear of detection and its consequences.

Many of the judges of the city courts, taking but a surface view, fail to perceive the worst elements in the character of these men, and filled with admiration of the intellectuality displayed in their schemes, and impressed by their social and business success, unconsciously yield to the spell of their influence, and allow this "man of business," who "possesses shrewdness and the qualities which go to make up a talent for practical affairs," to take the place of the plainly honest man as the standard by which to judge the acts of litigants in their courts. Consequently many transactions are by them adjudged to be legitimate, which are not so when properly viewed and measured by the right standard. When the well-contrived, half-decent frauds of such men are brought before them to be investigated and redressed, instead of the defendant being told that he has gained an advantage by deceit and must make reparation, these courts are too prone to regard the plaintiff as an unfortunate "of unequa-

[23] Story, Confl. Laws, § 23; Ferg. 405; 3 Eng. Ec. 507; Hosack, Confl. Laws, 265.

[24] Hosack, Confl. Laws, 265; Shaw v. Gould, L. R. 3 H. L. 55; Dorsey v. Dorsey, 7 Watts, 349; Thompson v. State, 28 Ala. 12. *Contra:* Deck v. Deck, 2 Swab. & T. 90; Bond v. Bond, 2 Swab. & T. 93, 420; 1 Id. 551.

[25] Duntze v. Levett, Ferg. 68; 3 Eng. Ec. 365, 371; Fraser, Confl. Laws, 46; Story, Confl. L. § 51; 1 Burge Col. & For. Laws, 57. 258; Strader v. Graham, 10 How. U. S. 82; Cheever v. Wilson, 9 Wall. 108.

[26] Story, Confl. L. §§ 23, 102, 51; 1 Burge Col. & F. Laws, 258.

capacity," having no "claim upon a court of equity," and to tell him, in substance, that he was a fool for being overreached. To find a warrant in the text of the law for their judgments, they have destroyed its equilibrium. They have been so impressed with the purpose of the law to afford full scope for the development of business activities, that they have failed to fully comprehend its provisions for the protection of the rights and possessions of those who are not so well endowed by nature or prepared by experience for self-help, as is the shrewd man of business. "Be always on your guard, or submit to the consequences," seems to be their summary of the law relative to questions of fair dealing. *Caveat emptor* and *vigilantibus et non dormientibus equitas subvenit* have become the ruling maxims; their range of application has been so extended, and they are held in such high favor, that either of them might well be inscribed as the motto on the seals of some of these courts. Were it not that their judgments are so often set aside by the Supreme Courts, their course of decision would soon clear the way in the commercial cities for the law of "the survival of the fittest" to take the form of "the survival of the shrewdest."

The inability of many of these city courts to discern fraud, unless it takes on the blacker hue of crime and becomes larceny, embezzlement or other offense, is well illustrated by the cases involving the issue of fraud, appealed from the courts of the City of St. Louis to the Supreme Court of Missouri. But seldom have the Supreme Court found that fraud did not exist, where the courts of St. Louis found that it did exist; but in many cases they have discovered fraud of the worst character, where the St. Louis courts saw none. Of late years the tendency of these latter courts to err on the side of fraud is marked. The cases of Ranken v. Patton, 65 Mo. 378, and Pomeroy v. Benton, 57 Mo. 531, are conspicuous instances. In the first, the shrewd man of business caused a young woman to give away property of great value to her rich old maiden aunts, his sisters, and dexterously made the victim an automaton to effect his purpose. Having regard to all but its moral quality, it was a really fine piece of work. The talent for practical affairs was manifested in every detail of the scheme, and especially in the artfulness with which fairness was simulated. The St. Louis court found nothing in the case to disapprove. It was reserved for the Supreme Court to set the fraud in a clear light and to show that the one of unequal capacity did have a claim upon a court of equity, as against the shrewd man of business. In Pomeroy v. Benton, the resident partner used the partnership funds for private speculation and realized immense profits. He concealed those facts from the non-resident partner, by making false reports to him, and when the firm was dissolved, bought that partner's interest in the firm assets, and, still keeping him in the dark, cunningly "induced the plaintiff (the non-resident partner) to execute to him a bill of sale sufficiently comprehensive in form to embrace the former's entire interest in the firm." Properly viewed, the fraud was of a nature and audacity "to offend the moral sense, shock the conscience and produce an exclamation," (5 Cowen, 584); yet in the St. Louis court no wrong was discovered; the defendant had merely achieved a legitimate triumph by means of his shrewdness. Not until the case was laid before the Supreme Court, was the defendant's conduct measured by the old-fashioned standard and found in every direction to lack the dimensions of honesty. The usual plea was made, that the plaintiff should have been on his guard,—amounting in this case to, that one partner should not have trusted the other. It drew from the Supreme Court language which should first have been heard from the court below: "It is no excuse for, nor does it lie in the mouth of the defendant to aver that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying, 'you trusted me, therefore I had a right to betray you.' *Vigilantibus et non dormientibus equitas subvenit* is without application here; it only applies where a party being apprised of, slumbers upon his rights. For the betrayal of confidence reposed, the skilful lulling to rest of the intended victim, the adroit closing of every avenue through which apprehension might enter—whether this be done by words or by expressive silence—are the earmarks of successful fraud the world over. And a court of equity, should it make such a perverse application of one of its fundamental maxims as that seemingly insisted on by defendant's counsel, would become the efficient ally of the vigilant wrong-doer and prove recreant to its past history and the principles on which its very jurisdiction rests."

It has been but a few years since the courts of New York City gave out so many decisions of the kind here criticised, as to attract the attention of the better classes of that community and convince them that the shrewd man of business had gained the complete mastery of their courts. Their indignation was great, and they treated the evil with severity. They forced the impeachment and removal from office of the offending judges. They believed the judges were corrupt, but in most instances they were undoubtedly mistaken. These judges had been caught by specious arguments and became victims of the idea that the comprehensive system of adroit trickery known by the mild name of shrewdness, was necessary for the fostering of commerce and the growth and magnificence of cities. They saw all around them that positions of trust and confidence were given, not as formerly to those who had good reputations for capacity and honesty, but to those who having some reputation for these qualities, also could furnish a pecuniary bond, with sureties of undoubted solvency. They saw the experienced everywhere in the attitude of distrust and watchfulness, and became so familiar with it as to believe that it was a necessary condition of business, and proper to be maintained by the courts. Under the influence of that belief they carried the letter of the law beyond the far-

thest reach of its spirit, and permitted to go, unchecked by their decisions, what the people knew to be frauds and menaces against the rights and possessions of every trusting man. The causes which insidiously led the New York judges into this course of error, exist in all the large cities and are operating with especial vigor in those where the way to judicial position is well-nigh barred against all who clearly discern the character of the shrewd man of business and refuse to adopt his methods.

The courts of last resort, in the several States, have, with hardly an exception, been quick to perceive and constant in opposing the false doctrine which so often leads their inferiors into error. Their firm stand for the unwary and trusting against the shrewd and cunning has caused many a sufferer from deceitful dealing to look over the heads of these city courts to them, as his sole hope of relief. That such transactions as those in the cases heretofore mentioned can be investigated by the lower courts and not discovered to be frauds, demonstrates that the rule by which they are judged is wrong. There will be no end to such errors until that rule is discarded. The plainly honest man, the business man whose pride is in his integrity and not in his shrewdness, must be the exemplar held up by the courts of the commercial cities before the community, and the assurance made good by acts that he is the standard by which all are to be judged. The right to trust; to believe the word of another; to be relieved from constant watchfulness upon those with whom business is to be done, must be preserved in undiminished substance by their judgments, and that master of the subtleties and refinements of fraud, the "shrewd man of business," taught, that if he does not conform his conduct to that of the honorable business man, he has good reason to fear the courts; for fear is the only restraint he knows, and to lessen his fear is to give him license.

MARINE INSURANCE—INSURABLE INTEREST—DEVIATION.

AMSINCK v. AMERICAN INSURANCE CO.

Supreme Judicial Court of Massachusetts, July, 1880.

1. One who has made an oral agreement with the owners of a vessel for her purchase, has an insurable interest therein.

4. In an action upon a marine policy, the declaration alleged that the defendants insured a vessel "on a voyage at and from New York, via Bangor, to St. Michaels, Western Islands; and while proceeding on said voyage said ship was wrecked and totally lost by the perils and dangers of the sea;" and the answer admitted that the defendants insured the ship for that voyage, but contained a general denial of each and every other allegation in the declaration. The plaintiff introduced evidence to prove that the vessel was prosecuting the voyage set out in the declaration, and named in the policy. *Held*, that under the pleadings the defendants were entitled to rebut and control the plaintiff's evidence by showing a deviation from that voyage through unreasonable delay at Bangor.

The facts sufficiently appear in the opinion.

L. S. Dabney and *Dana & Harding*, for plaintiffs; *Hutchins & Wheeler*, for defendants.

ENDICOTT, J., delivered the opinion of the court:

Upon the facts reported the court is of opinion that Machado had an insurable interest in the vessel at the time the policies attached, even if we assume that they took effect on July 5th, 1876, the day of their date. On that day the plaintiffs, as agents for Machado, made an oral agreement in New York with the owners of the vessel for her purchase for the sum of $11,000, payable on delivery of a proper bill of sale; and, having previously ascertained that the defendants would insure her, they gave directions to have the insurance closed. The policies were written on that day; the precise time of their delivery does not appear. The oral contract to purchase was reduced to writing and signed by the plaintiffs and the owners on July 7th, and a portion of the purchase money was paid on that day. Possession was taken by Machado, the balance due was paid, and a bill of sale was duly executed to a third person in trust for Machado, who was a foreigner.

It is conceded by the defendants that Machado was the only person whose interest was insured, as appears by the declaration and the policies. But they contend that he had no insurable interest on July 5th, for at that time he had only an oral contract for the purchase of the vessel, and that such a contract, being within the statute of frauds, and incapable of being enforced, gives no insurable interest.

But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute pre-supposes an existing lawful contract, it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is, therefore, to be "treated as a valid subsisting contract, when it comes in question between other parties for purposes other than a recovery upon it." Townsend v. Hargreaves, 118 Mass. 325; Cahill v. Bigelow, 18 Pick. 369; Beal v. Brown, 13 Allen, 115; Norton v. Simonds, 124 Mass. 19; see Stone v. Dennison, 13 Pick. 1. Machado had under his oral agreement an interest in the vessel, and would have suffered a loss by her injury or destruction. Eastern Railroad Co. v. Relief Fire Ins. Co., 98 Mass. 420. This interest he could have assigned for a valuable consideration; and if he had assigned it, all the rights afterwards perfected in him would have inured to the benefit of his assignee. Norton v. Simonds, *supra*. The case of Stockdale v. Dunlap, 6 M. & W. 224, relied upon by the defendants, does not sustain their position for reasons which are stated in Townsend v. Hargreaves, *supra*.

The several policies of the defendants insure the ship on a voyage "at and from New York, *via* Bangor, to St. Michaels, Western Islands." She left New York September 3d, and arrived at Bangor September 13th, where she took in additional cargo; from that port she sailed October 27th, and was lost on her passage to St. Michaels. The defendants offered evidence of unreasonable delay at Bangor, where the ship remained for forty-three days, contending that under the general denial of the answer, they could show that she did not sail on the voyage insured; in other words, that there was a deviation. Any departure from the route named in the policy to a port or place not named, and any delay in prosecuting the voyage, without necessity or just cause; or any delay at a port named in the policy for the prosecution of business not connected with the business of the voyage, or any unreasonable delay at such port in prosecuting the business of the voyage is a deviation. Whether the risk is increased thereby is immaterial; the assured has no right to substitute a different voyage for that which is insured, and can only recover for a loss sustained while the ship is prosecuting the voyage named in the policy; and if she has deviated prior to the loss, she is not then prosecuting the voyage for which she was insured. Whenever, therefore, she departs from the route, or delays in the prosecution of it, it is incumbent on the assured to show that the departure was caused by necessity, or that the delay at a port named in the policy was reasonable under the circumstances in order to accomplish the objects of the voyage. Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, and cases cited; African Merchants v. British Ins. Co., L. R. 8 Ex. 154.

The declarations in each of these cases allege that the defendants insured the ship "on a voyage at and from New York, *via* Bangor, to St. Michaels, Western Islands; and while proceeding on said voyage said ship was wrecked and totally lost by the perils and dangers of the seas." These are necessary allegations, which the plaintiff is bound to establish in order to recover, namely, that the ship was insured on that voyage, and while prosecuting it she was lost by the perils of the sea. The answers admit that the defendants insured the ship for that voyage, but they contain a general denial of each and every other allegation in the declaration. In this state of the pleadings the plaintiffs introduced evidence to prove that the ship was prosecuting the voyage named in the policy when she was lost; that she sailed from New York to Bangor, and from Bangor to St. Michaels and was totally lost between those ports. We are of opinion that the defendants should have been allowed to rebut and control that evidence, which was a necessary part of the plaintiff's case, by showing that the ship did not sail on the voyage insured, that there was a deviation from that voyage by unreasonable delay at Bangor; and evidence of deviation, by departing from the route, or by unreasonable delay in prosecuting it, is appropriate to prove that the voyage actually prosecuted was not the voyage insured. It certainly would have been competent to prove under the general denial, and in reply to the plaintiff's evidence, that the ship went to Portland and not to Bangor, and it is equally competent to prove that she deviated from her route by unreasonable delay at Bangor. The defendants rest their defense not upon matter in discharge and avoidance, but upon a denial of the allegations in the declarations, to support whi ch evidence must be introduced; and we are of opinion that the ruling, which excluded the evidence offered by the defendants as inadmissible under the answer, was erroneous. A denial of each and every allegation in the declaration puts in issue every fact which the plaintiff must prove to make out a *prima facie* case. Gen. Sts. c. 129, § 17; Mulrey v. Mohawk Valley Ins. Co. 5 Gray, 541; Lincoln v. Lincoln, 12 Gray 45; Boston Relief and Submarine Co. v. Burnett, 1 Allen, 410; Davis v. Travis, 98 Mass. 222; Brigham v. Aldrich, 105 Mass. 212; Hill v. Compton, 119 Mass. 376; Mosler v. Potter, 121 Mass. 89. Of these cases, Lincoln v. Lincoln most nearly resembles the case at bar. It was there held that under an answer denying the making of a promissory note, an alteration after it was signed may be proved; and it was said by Mr. Justice Metcalf in delivering the opinion: "No law of which we have any knowledge requires a defendant to give a plaintiff notice of the evidence which he intends to produce by way of rebutting that which the plaintiff must produce in order to support his case." The question is to be decided under our system of pleading, as expounded by this court, and it is immaterial what may be the rule at common law, or under the practice in England.

In this aspect of the case we express no opinion upon the other questions raised in the report. * * * * As we decide that Machado had an insurable interest in the ship when the policies attached, and that it was open to the defendants to show that there was unreasonable delay at Bangor, the cases must stand for trial upon the questions of delay at New York and Bangor.

Verdict set aside.

RECEIVER — INSOLVENT NON-RESIDENT CORPORATION — NON-RESIDENT SECURITY.

TAYLOR v. LIFE ASSN. OF AMERICA.

United States Circuit Court, Western District of Tennessee, August, 1880.

1. It may be proper in the Federal courts to appoint a non-resident of the State where the court is held a receiver; and although a party to the suit, if indifferent and impartial, the receiver of a court in another State may be appointed, when a corporation residing in that State has become insolvent, and he has by a competent court been appointed, as an officer designated by law to receive and manage the assets situated whereever the company has done business. The considerations that should influeuce an appointment under such circumstances stated.

2. In the Federal courts, the non-resident parties will not be restricted to finding sureties resident in the State where the court is held, when required so give bonds in the progress of the litigation, unless for special reasons the court should so direct. This applies when a non-resident is appointed receiver.

In equity.

Smith & Collier, for plaintiffs; *Wright & Folkes* and *Carr & Reynolds*, for defendants.

HAMMOND, J.

Application is made to reconsider the order heretofore entered, appointing the defendant, W. S. Relfe, receiver in this case; and objection is taken to his bond because the sureties are non-residents of Tennessee.

The facts necessary to be stated are that the Life Association of America was a corporation of the State of Missouri, doing business, as was stated at the bar, in thirty-two of the States of the Union. It became insolvent, and by statutes of Missouri it became the duty of the defendant, W. S. Relfe, as a public officer appointed by law for the purpose, to wind it up under the insolvent laws of that State. To this end he commenced the necessary proceedings in the proper court in Missouri. And by its decree the corporation being declared insolvent, Relfe was appointed receiver with instructions to collect the assets everywhere in all the States and hold them for distribution as required by law, under the supervision of that court. The corporation was also required, and did, by formal assignment, convey all the assets to Relfe for the purposes of administration, under the insolvent laws of Missouri. He is under a bond of $100,000, in Missouri, for the faithful performance of these duties, and is paid an official salary in lieu of all compensation.

The plaintiffs in this case, citizens of Tennessee, claim to be creditors of the corporation, which was a mutual concern, and are all policy holders, one only of the policies being matured by a death loss. It seems to have been a regulation of the company to lend its funds arising from the business in any State upon mortgages within that State, so that there are within this district some $25,000 or more of loans to citizens of Tennessee, secured by notes and mortgages given upon lands situated here. These plaintiffs insist by their bill that they have a prior claim on these Tennessee assets, setting up an agreement that they should stand as security for their policies, and otherwise, that by the general law they have a right to be satisfied before these Tennessee funds can be removed to Missouri. The bill seeks to wind up the corporation under the Tennessee insolvent laws, and may be called a general creditors' bill for that purpose, asking the appointment of a receiver. It was filed in the State chancery court, the corporation, Relfe and the Tennessee debtors being made parties defendant. An injunction was granted restraining Relfe from exercising his functions in this State, or collecting these assets, and an attachment was issued impounding them for the satisfaction of plaintiffs' claims.

The corporation and Relfe answered, denying the equities and claims of the plaintiffs to priority or to a separate administration here, and setting up Relfe's title under the laws of Missouri and the assignment made to him. Having answered, they removed the cause to this court, and thereupon moved to dissolve the injunction and discharge the attachment. The plaintiffs having failed on a motion to remand for want of jurisdiction, moved for a receiver.

On the argument of these motions it occurred to me that the questions were of too grave a character to be determined in so preliminary a manner, and should abide the hearing upon full proofs as to the facts; and that, in the meantime, the assets should be collected with as little delay and expense as possible. Being desirous, upon principles of comity, if for no other reason, to give as much effect as possible to the proceedings in Missouri, the home of the corporation, without injury to any of the rights, real or supposed, of the Tennessee creditors, it at first appeared to me that it would answer the ends of justice to refuse a receiver, dissolve the attachment, and permit Relfe to go on with his collections, but to restrain him from taking the funds beyond the jurisdiction of the court until this controversy was settled, and to require him to pay his collections into the registry of this court, as a further security against their removal. This was not satisfactory to the plaintiffs, and inasmuch as they insisted that the laws of Missouri could not operate in Tennessee, nor the decrees of its courts, nor the assignment in a case like this, it seemed necessary to strengthen Relfe's title by appointing him receiver here, and it was so ordered. He was required to pay the funds into this court, and enjoined from making any other disposition of them. He submitted to this course and accepted the conditions, presumably with the consent and advice of the court in Missouri; but whether that be so or not, the power to prevent any injury by his removing the assets was considered ample, and I had no doubt the proceedings could progress amicably between the two courts and much unnecessary expense be thereby saved. He has tendered the required bond with sureties residing in Missouri, of ample means for the purposes of security. This petition for a re-hearing is a very earnest protest against that decree and against a bond given only by non-residents. The objections are (1) that Relfe is an officer of a foreign State subject to its laws; (2) that he is the receiver of a foreign court subject to its control; (3) that he is a party to the suit and not indifferent or impartial; (4) that he is a non-resident and resides at a distance, and (5) that his sureties at least should reside here.

As a general rule the appointment of a receiver and the proper person to be appointed are matters within the discretion of the court; not arbitrary it is true, but to be governed by sound considerations of judicial judgment, each case to be determined according to its own circumstances. High on Receivers, § 65; Kerr on Receivers, Bisph. Ed., § 577. Private preferences must yield to public considerations; and no man can claim it for himself or his particular friend, especially in a case like this, where so many absent parties not known

to the record, and who are and doubtless will remain quite ignorant of these proceedings, are interested in the subject matter of this controversy. *Re* Empire City Bank, 10 How. Pr. 498 Edwards on Receivers, 260.

Most of these objections would have great force, if in the relations we bear to the State of Missouri it is to be treated as a foreign State, and its citizens entitled in our courts to such considerations only as are given to foreigners. It must be conceded that in this matter of insolvent laws and the administration of assets situated in different States, there has grown up a selfishness which comes very near to that which absolutely foreign States show to each other. But after all, principles of courtesy and comity do prevail and the insolvent laws of one State may be permitted to operate in another State for the promotion of justice, when neither the latter State nor its citizens will suffer any inconvenience or injury thereby, and the title of a foreign receiver will be recognized where it can be done without detriment to the citizens of the State granting the recognition. High on Rec. § 47.

I have no doubt that this court is so far a court of the State of Tennessee, that it is its duty to afford all the protection to the plaintiffs in this case which a State court would or should afford to its own citizens. But it is also true, that because of a fear—whether well or ill founded, it is not material to inquire—that State tribunals would give more consideration to the interests of the citizens of the State than would always be justified in controversies between their own and citizens of other States, the Federal courts have been invested with concurrent jurisdiction over such controversies. This seems to imply that in this court, at least, the citizens of other States should not be considered so much as foreigners, and their non-residence here should not weigh so much against them in the enforcement of rules and regulations of practice governing the discretion of the court in appointing receivers and taking bonds. Relfe is subject to this court, can be removed or punished for contempt, and in this day of railroads and telegraphs, his residence a day's journey from the State where his duties are confined to foreclosiug mortgages by legal proceedings or sales under powers of trust, can not be a serious objection. High on Rec. § 69.

He is required to account semi-monthly, and no opportunity is afforded for any violation of the injunction. It is no more onerous for these citizens of Tennessee to be compelled, if necessary, to pursue Relfe for a breach of his duties in the courts of Missouri than it would be to compel the citizens of Missouri, or any of the thirty other States, to pursue a citizen of Tennessee for any breach of his duties as receiver, if one should be appointed residing in that State. And this applies as well to the sureties on the bond. The plaintiffs are not alone interested in the receiver and his bond. A receiver should, undoubtedly, be an impartial and indifferent person, High on Rec. § 63 *et seq*; Kerr on Rec. 2; and generally neither a party to a suit nor a trustee whose business it is to watch a receiver, should be appointed. Kerr on Rec. 126. But these rules are not without numerous exceptions. Id.; High on Rec. §§ 63-81; Benneson v. Bill, 62 Ill. 408, 411. The interest of all the creditors of every grade should be considered. Richards v. Railroad, 1 Hughes, 28.

Relfe, in this case, does not occupy the attitude of a party owning property over which there is a controversy. He is not a trustee solely for particular persons antagonistic to the plaintiffs here. He is trustee for the plaintiffs as much as others. It is immaterial to him how the funds are distributed or who has priorities. He is wholly impartial and indifferent, or should be. It is his duty to resist every claim not legal and lawful, and to pay just as he may be ordered, but this does not make him partial or antagonistic to one policy holder more than another. He has all the books, all the papers and is familiar with all the business of the company. He has supervision everywhere, and it does seem to me that if the law be that the assets in each State must be administered separately, it would greatly facilitate matters, and be to the advantage of all persons interested, to have one man receiver in all the States, although he be required to account in each State; and that the principles for which plaintiffs contend may be enforced as well with such a receiver as with thirty-two of them.

In Wilson v. Greenwood, 1 Swanst. 471, 483, a party to the suit, which was a bill to settle up a partnership, was appointed receiver, and Chancellor Cooper approves the practice for obvious reasons that apply as well to a case like this. Todd v. Rich, 2 Tenn. Ch. 107. Plaintiffs were receivers in Boyle v. Bettew Llantwit Co. L. R. 2 Ch. Div. 726. The case of Perry v. Oriental Hotel Co., L. R. 5 Ch. Ap. 420, is directly in point, a receiver having been removed in order to appoint the liquidator of the company receiver; and in Campbell v. Compagnie De Bellegarde, L. R. 2 Ch. Div. 181, the same thing was done, the court saying it was intolerable to have numerous receivers. So far as possible the same principle should be applied in cases like this. In Barcroft v. Snodgrass, 1 Cold. 430, a trustee in an insolvency assignment was appointed receiver. It does not appear that any objection was made, neither does it appear that any consent was given. Instances of the appointment of non-residents, parties and trustees, as receivers, will be found in Wilmer v. Railroad, 2 Woods, 410; Stanton v. Railroad, Id. 506, and Young v. Railroad, Id. 606, and no doubt it is often done in the Federal courts. Where the court appointed a receiver in India, he was required to give sureties resident in England. Cockburn v. Raphael, 2 Sim. & Stu. 453. But in *Ex parte* Milwaukee Railroad Co., 5 Wall. 188, the Supreme Court did not concur in the opinion of the district judge, that the fact of the non-residence of the sureties within the district was sufficient reason for rejecting a bond otherwise unobjectionable. It was a *supersedeas* bond, but I see no difference in principle. The non-resident litigants in the Federal courts should not be restricted, in giving litigation bonds, to finding

sureties away from their homes, where it is often difficult, if not impossible, to do so. If there be a special reason for requiring it, the court can so act, but it would put them to a disadvantage to establish it as a rule that the non-resident party in our Federal courts must, when a bond is necessary, find sureties in the place where the court is held.

The bond in this case will be approved, and the re-hearing refused.

NEGOTIABLE PAPER—WHEN NOTICE OF DISHONOR NOT GOOD BY MAIL.

FORBES v. OMAHA NATIONAL BANK.

Supreme Court of Nebraska, July, 1880.

Where one entitled to notice of dishonor of a negotiable instrument resides within the same post-office delivery as the one whose duty it is to give the notice, it must be personally served or left at his residence; it is only where he resides nearest to or is accustomed to receive his mail at another post-office that notice is good by mail.

Action upon a promissory note by the Omaha National Bank against R. M. Forbes and another. Sufficient facts appear in the opinion. From a judgment in favor of plaintiff below a writ of error was taken.

George W. Doane, for plaintiff in error; *E. Wakely*, for defendant in error.

COBB, J., delivered the opinion of the court:

Several questions are presented by the record in this case; but as one of them appears to me to quite overshadow the others in point of importance, and the conclusion reached in its examination being decisive of the case, I deem it unimportant to consider the others. The district court found "that the said Samuel Hawver and R. M. Forbes were respectively duly notified of such presentment, non-payment and refusal, and that the plaintiff would look to them respectively for payment of the same, with damages and costs; that at the time of such presentment and notification the said R. M. Forbes resided about one mile or one and a quarter miles outside of the corporate limits of the City of Omaha, in the State of Nebraska, where the said bank was situated and did business and said draft was payable, and where the notary hereinafter mentioned resided, and that said R. M. Forbes had no regular or usual place of business in said city; that the post-office at which he then obtained his mail was the post-office in the City of Omaha, which was the nearest post-office to his residence, and about three miles therefrom; that on the evening of October 23, 1871, when the note was presented for payment, one William Wallace, a notary public and agent of the plaintiff's bank, deposited in the post-office at Omaha notice in due form of the presentment and dishonor of said draft, and that plaintiff would look to him for payment thereof, directed to the said R. M. Forbes, at the post-office in Omaha, with the postage thereon paid."

Thus, while the court finds that the said Samuel Hawver and R. M. Forbes were respectively duly notified of such presentment, non-payment, refusal, etc., it does not fail to put us in possession of the facts upon which it bases such finding, so far as the plaintiff in error is concerned, and the question whether such facts do sustain the finding that the plaintiff in error was duly notified, is, in my opinion, the controlling one in this case.

While the evidence of the fact of the depositing of the notice in the post-office is not by any means clear, yet as the same was deemed sufficient by the trial court, I will confine my examination to the question whether such fact, taken in connection with the collateral facts and circumstances surrounding this case, constitutes legal notice. This question has often been before the courts of several of the States of the Union, and once before the Supreme Court of the United States. It has not been previously brought before this court, and as the views and decisions upon it of the several State and Federal courts are altogether conflicting and irreconcilable, this court should be free to decide it in this case as may seem most likely to meet with the ends of justice, and at the same time establish a precedent the least liable to lead to unfairness or abuse.

The question may be fairly stated thus: Whether, where the drawer or indorser of a draft, note or bill of exchange resides outside of the corporate limits of a city or village, which is the place of dishonor of such draft, note or bill of exchange, but nearer to the post-office in such city or village than to any other post-office, notice of the dishonor of such draft, note or bill of exchange can be legally given to such drawer or indorser by depositing the same in such post-office, directed to such drawer or indorser.

In the case of Ireland v. Kip, which was twice before the Supreme Court of New York (10 Johns. 490, in 1813, and 11 Id. 231, in 1814), it was held that where the indorser to be charged resided at Kip's Bay, within the corporate limits of New York City, but outside of the compact portion of the city, and where the letter carriers did not deliver letters, but had a place of business on Frankfort street, within the compact part of the city, where he had directed the letter carriers to leave all of his letters, and the notice of dishonor was put into the post-office in New York city, directed to the indorser, at his place of business on Frankfort street, the same was not sufficient notice of the dishonor of the bill to charge the indorser. In the opinion the court uses this language: "The invariable rule with us is that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount, such as leaving it at the dwelling-house or place of business of the party, if absent. If the party to be served by a notice resides in a different place or city, then the notice may be sent through the post-office to the post-office nearest the party entitled to the notice."

The authority of this case has never been

shaken. But unfortunately when the courts came to apply it to cases like the one at bar, they separated widely; the Supreme Courts of New York, Connecticut, Massachusetts, Maine, Louisiana and Tennessee holding in effect that the words "city or place," as used by the court in Ireland v. Kip, should be understood as meaning the place in fact rather than in law, and that the indorser or maker, entitled to notice of dishonor, must be served personally, or by leaving the notice at his residence or place of business, unless he resides nearer to some other post-office, in which case notice may be sent to him by mail. Say the court, per Bronson, J., in Babcock v. Benham, 4 Hill, 129, "the post-office is not a place of deposit for notices to indorsers, except when the notice is to be transmitted by mail to another office." In Ransom v. Mack, 2 Hill, 587, the same judge, in delivering the opinion of the court, uses the following language: "The corporation limits of our cities and towns have, I think, less to do with this question than the mail arrangements of the general government and the business relations of our citizens. Whether mail service is good or not does not depend upon the inquiry whether the person to be charged resides within the same legal district, but upon the question whether the notice may be transmitted by mail from the place of presentment or demand to another post-office, where the drawer or indorser usually receives his letters and papers."

In the case of Shelburne Falls National Bank v. Townsley, 102 Mass. 177, decided in 1869, Ames, J., delivering the opinion of the court, says: "The letter was left at the post-office, not for the purpose of being transmitted by mail to any other town or post-office, and not to go into the hands of any official carrier charged with the distribution of letters at the dwelling-houses and places of business of the inhabitants of the vicinity; on the contrary, it did not go into the mail at all, but was simply deposited in the Shelburne Falls post-office, to remain there until called for by the defendant. We do not find that any case has gone so far as to decide that notice through the post-office may be given in the same manner and with the same allowance of time, where both parties reside in one town or resort to the same post-office, as where they reside in different towns communicating with each other by regular mails. There may be but very little practical difference in this subject between letters left for deposit and those left for transmission; but we do not feel at liberty, for such considerations, to disregard distinctions, even though they appear somewhat arbitrary, or attempt to improve rules that have become settled by judicial decisions and the usage of business. * * * * In the instructions which were given to the jury these distinctions appear to have been overlooked, and they may have given their verdict under the impression that a drop-letter, left at the post-office after the close of the business day on the 11th, and not likely to be received until the 12th, would be reasonable notice, even though the plaintiff bank had received the same as early as the 10th. In other words, that the rule as to post-office notifications, where both parties reside in the same town or village, and resort to the same post-office, and where no system of distribution by letter carriers has been established, would be the same as if they lived in separate towns, having regular communication by mail. Upon this point, therefore, the defendant's exceptions must be sustained." In the case of State Bank v. Rowell, 6 Martin (N. S.), 267, the Supreme Court of Louisiana, by Porter, J., who delivered the opinion, say: "The case has been well argued, but the reasoning of the counsel in our opinion, rested entirely on an incorrect view of the obligation contracted by an indorser of instruments of this kind. The obligation which such an act creates is strictly a conditional one, and that condition is that he will pay the money in case the maker does not, provided due notice is given to him of the default of the former. By the *lex mercataria* this fact must be proved by establishing that knowledge of the failure of the principal to pay was communicated personally to the indorser, or that information to that effect was left at his house. A relaxation of this rule has been introduced for the convenience of trade. When the indorsers live at such a distance that their residence is nearer another post-office than where the holder lives, in such cases it is sufficient to send by mail a notice directed to the indorser."

All of these cases, and many others cited in the brief of counsel, seem to hold that where the person whose duty it is to give the notice, and the one to be charged by the notice, both reside within the same post-office delivery—a term well understood in this country—then the notice must be served personally, or left at the residence or place of business of the person to be charged, and that the post-office can only be resorted to in cases where the person to be notified resides nigher to, or is in the habit of receiving his mail matter at, another post-office, to which the notice may be sent by mail; and this I believe to be the correct rule. It is true that there are many decisions the other way, and as a question of authority, it would be one quite difficult to decide. The Supreme Court of the United States, and those of Pennsylvania, Indiana, Missouri, and as is claimed, South Carolina, have held to the contrary, that when the person to be notified resides outside of the legal limits of the town, city or village where the party giving the notice resides, but nigher thereto than to any other post-office, or is in the habit of resorting to the post-office in such town, city or village for mail matter, then the notice may be legally served on him by depositing the same in such post-office, directed to the person to be notified at the post-office where the same is deposited.

In enumerating the States where this question has been decided either way, I do not include Kentucky, because that State is about equally divided on the question; the former view having been taken by the old Supreme Court, presided over by Chief Justice John Boyle, in 1832, and the latter by the Supreme Court of that State in 1858, in an exhaustive opinion by Judge Stiles.

Nor do I include Mississippi, where the question has been several times before the Supreme Court, and where, unfortunately, the holdings have not been uniform. But their two latest, and, I think, best-reasoned cases, follow New York, Massachusetts, etc. But all the cases, as well those which hold the latter as the former view, agree in this: that where the person to be notified resides in the same city or village with the person whose duty it is to give the notice, then notice can not be given through the post office.

Having carefully examined all the cases cited by counsel, I have failed to find any sufficient reason, or indeed any reason, for a distinction in this respect between persons residing within the city or village limits and those who, though living outside such limits, are within the post-office delivery. Had this court the power to change the law, it might be worth considering whether it would not be well to provide that all notices might be served through the post-office; but were any change in that direction contemplated, certainly no one would think of excluding from its operation only those who, from the contiguity of their residence to the post-office, as well as from the nature of their business pursuits, are the most unlikely to be incommoded by such change. Those inhabitants of a city or village who are at all likely to draw or indorse commercial paper, generally keep themselves in daily intercourse with the post-office, and when not absent from home would nearly always receive a notice posted to them at their own post-office the same or the next day. But this can not be said of those who live in the country. They, as a rule, seldom go to the post-office oftener than once a week to receive their weekly newspaper, or less often, as called for by the needs of family correspondence. Persons thus situated would not generally receive a notice of protest through the post-office in time to answer the purpose for which notices are required, to wit, to give the indorser or drawer a fair start with others in pursuit of the property of a defaulting principal. Again, the inhabitants of cities and villages who draw or indorse commercial paper, are, as a rule, business men, who do it as a part of their regular business, and carefully note and watch the dates of the maturity of such paper, and whether or not it is duly honored. While many farmers and other inhabitants of the country are in the habit of becoming accommodation indorsers for business men, they keep no dates, but rely confidently on their principal to protect their paper. To such, a prompt and certain notice of dishonor often may save them from ruin.

It is true that the rule is well settled that where the person entitled to notice resides far away from the place of dishonor, that his place of residence is nearer to another post-office, or where he habitually resorts to another post-office for mail matter, then notice may be sent him by mail. This arises from the nature and necessities of the case; and besides, it is a fair presumption, where a person draws or indorses commercial paper payable at a distant bank or place, that he thereby impliedly agrees to receive notice of its dishonor through the post-office—the usual channel of communication between distant points. But not so an indorser of paper payable at a bank situated within his own post-office delivery.

In most of the cases where the courts have come to a conclusion different from that which I have been able to reach in an examination of this question, they give as a controlling reason for such conclusion, that to require personal notice, or its equivalent, to indorsers residing outside the limits of cities and villages, would be to lay an additional burden on the holder. I am unable to accord much weight to their reason. Notaries' fees for protest and notice, and including mileage, follow the protested paper, and the costs of sending a notary or special messenger to serve a notice anywhere within the delivery of any post-office in the settled portion of the country would be but trifling compared to the amount generally involved, and I think it affords a fair application of the maxim, *de minimis non curat lex.*

As to the point that although the plaintiff in error may not have been legally notified, he afterward waived such notice, I have only to say that no such waiver was found by the district court; and had it been, I do not think that there was sufficient evidence to have sustained it.

The judgment of the district court is therefore reversed and a new trial ordered.

PARTNERSHIP — SHARING IN PROFITS — CONTRACT UNDER SEAL—ASSUMPSIT.

BOSTON, ETC. SMELTING CO. v. SMITH.

Supreme Court of Rhode Island, May, 1880.

1. A and B entered into an agreement under seal, by which B was to loan A $5,000 for one year, or indorse his note for that amount for that time, and also indorse his notes to an additional amount not exceeding $2,000, if B thought such sums required for A's business. For this A was to pay B ten per cent. of his net business profits of the year, and two per cent. of his net profits for each $1,000 indorsed for him over said sum of $5,000; A also agreeing to conduct his business to the best advantage, and to keep accurate accounts thereof to be at all times open to B's examination. *Held*, that this did not constitute a partnership between A and B, either as between themselves or as to third persons.

2. A brought *assumpsit* against B and others whom A claimed to be co-partners of B, for goods furnished them under a sealed agreement executed by A and B. *Held*, that the action would not lie. As against B, A's claim rested on a specialty, and as B alone could not be made liable in *assumpsit*, so B in company with others could not be held in *assumpsit*.

DURFEE, C. J., delivered the opinion of the court:

This is an action of *assumpsit* for goods sold and delivered by the plaintiff corporation to the defendants, who are alleged to have been co-partners in business at the time of their delivery. The names of the defendants are, first, William T. Smith, and, second, certain persons constituting the firm

of Mason, Chapin & Co., to-wit: E. Philip Mason, William P. Chapin, Charles S. Bush, and Samuel L. Peck. Two questions, one of which may be decisive of the case, are submitted to the court for determination, preliminarily to the full trial. The first is, whether the following agreement between the defendant, William T. Smith, and the other defendants, is evidence of a co-partnership between them.

"This indenture, made this 25th day of April, in the year 1878, between William T. Smith, of Providence, in the State of Rhode Island, of the first part, and Mason, Chapin & Co., of the said Providence, of the second part, Witnesseth: That in consideration of the agreements herein made, the said party of the first part covenants with the said parties of the second part, that on the first day of May, in the year 1879, he will pay to them ten per centum of the net profits of the business, carried on during the year preceding the day last named, under the name and style of 'Elmwood Chemical Works, William T. Smith, Treasurer,' in consideration of their loan to him of $5,000, or of their indorsements for him to that amount, for and during the year aforesaid, and will also pay to them two per centum of said net profits for each sum of $1,000, for which they may indorse for him during said year in addition to said sum of $5,000; and that he will conduct said business during said year to the best advantage, and keep accurate accounts thereof upon books which shall be at all times open for examination by them.

"And that the said parties of the second part, in consideration of the foregoing agreement, covenant with the said party of the first tha they will loan to him $5,000 for the term of one year, from the first day of May, 1878, or indorse his note for that amount, renewable from time to time during said term, and will also during said year, if in their judgment required for the proper management of his business aforesaid, indorse his notes to an amount not exceeding $2,000 in excess of said $5,000.

"In witness whereof, the said parties hereto set their hands and seals, the day and year first above written.

"Executed in presence of
EDGAR G. ROBINSON,
witness to both signatures.
WILLIAM T. SMITH, [Seal.]
MASON, CHAPIN & CO. [Seal.]"

The contract, it will be noted, is executory, and of course does not create a partnership between the parties to it until something is done to carry it into effect. We presume, therefore, that the meaning of the question put to us is, Is the contract such that it would create a partnership between the parties to it, if carried into effect according to its terms, or such that, if so carried into effect, it would render the parties to it liable as co-partners to third persons? We will consider the question as if so propounded.

If we regard the contract simply as a contract between the parties to it, to be construed as contracts are usually construed, so as to carry out their intention, we think there can be no doubt that it can only be considered a contract for a loan of money or credit in consideration of a percentage of profits in lieu of interest. It gives the lenders no voice in the management, and no interest in the capital, of the business. It gives them only a percentage of the profits for a single year in a continuing business. It is true they are to have the right to inspect the books, but only for information. The contract calls the business his, *i. e.*, the borrower's, and it remains exclusively his, as much during the continuance of the loan as before or afterwards. The contract, as between the parties to it, is, therefore, simply a contract for a loan of money or credit, and if, when carried out, it renders them liable as co-partners, it is not because they have agreed to become such, but, independently of their agreement, by force of an arbitrary or artificial rule, or by operation of law.

The plaintiff corporation contends that the members of the firm of Mason, Chapin & Co. have, by sharing or being entitled to share the profits of the business carried on by Smith, become, if not actual co-partners with him, at least liable with him as co-partners to third persons for the debts contracted by him in the prosecution of his business.

The position taken by the plaintiff corporation has the support of the earlier English and of numerous American decisions, and, previous to the decision of Cox v. Hickman in the House of Lords, in 1860, was so well established that Judge Story, in his work on the Law of Partnership, while he questions whether it would not have been "more conformable to true principles, as well as public policy, to have held that no partnership should be deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public," declares, nevertheless, that "the common law has already settled it otherwise," and that "therefore it is useless to speculate upon the subject." Story on Partnership, sec. 36. The ground of the doctrine was that a person who shares the profits ought to share the losses, because he takes a part of the fund out of which the losses are to be paid. But the ground will not bear examination; for, in point of fact, the losses are no more payable out of the profits than out of the capital, and in other cases it has been decided, quite inconsistently with this ground, that it is only a participation in the net, not the gross, profits, which makes the participant a *quasi* partner. Other grounds, but none more satisfactory, have been suggested. Indeed, the doctrine, though well received by some judges, appears to have been always regarded by others as an anomaly or legal solecism. It was soon relaxed in favor of agents or servants, who, it was held, might take a share of profits by way of compensation for their services without becoming *quasi* partners. The English courts, however, refused to extend the exception to cover a loan of money, though upon principle it is impossible to discern any difference whether a portion of the profits goes to

pay for services or for money contributed to the business. Mr. Lindley, in his excellent work on Partnership, suggests that this difference of decision was owing to the statutes against usury, because in many cases a loan of money for a share of profits could only be upheld by regarding the lender as a partner. Lindley on Partnership, 3d ed., 23–5.

Such was the state of the law, as it was generally understood, or, to put the matter as some of the later English judges prefer to put it, as it was generally misunderstood, when, in 1860, the House of Lords decided the case of Cox v. Hickman, 8 H. L. 268. The gist of that decision was that a mere participation in profits does not make the participant a partner unless he has in fact agreed to become such, but is only *prima facie* evidence that he is such, and is rebuttable by counter-proof to be found in the contract or transaction or in the circumstances connected with it. The real question is, Did the person who is sought to be charged on account of his participation in the profits ever enter into the relation of copartner with the other participant, or, in other words, do they participate on the common footing of principals in the business? And, in explication of the question, it was said that the law of partnership is a branch of the law of agency, inasmuch as, wherever an actual partnership exists, the partner who ostensibly carries on the business does it for himself and as agent for his copartners; or, to put the matter in another form, he and they carry it on through him on their joint account, so that in law, on the principle of agency, whatever he does in the prosecution of the business they do, and whatever debts he contracts they contract with him. In Holme v. Hammond, L. R. 7 Exch. 218, 230, it is stated that the import of the opinions delivered in the House of Lords in Cox v. Hickman is correctly summed up by O'Brien, J., in Shaw v. Galt, I. R. 16 C. L. 375, thus: "The principle to be collected from them appears to be, that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others."

The doctrine promulgated in the decision of Cox v. Hickman has been developed and applied in England in many subsequent cases, and may now be regarded as established law in that country. Bullen v. Sharp, L. R. 1 C. P. 86; Holme v. Hammond, L. R. 7 Exch. 218; Mollwo March & Co. v. Court of Wards, L. R. 4 P. C. 419; Pooley v. Driver, L. R. 5 Ch. Div. 458; *Ex parte* Tennant, L. R. 6 Ch. Div. 303, the substance of which is stated in Hart v. Kelley, 83 Pa. St. 286, 290; Lindley on Partnership, 3d ed., 35–47. The doctrine has likewise been laid down or approved in many American cases. Hart v. Kelley, 83 Pa. St. 286; Harvey v. Childs, 28 Ohio St. 319; Smith v. Knight, 71 Ill. 148; *In re* Francis, 2 Sawyer, 286; 7 Nat. Bankr. Reg. 259; Williams v. Soutter, 7 Iowa, 435; Polk v. Buchanan, 5 Sneed, 721; *In re* Ward, 8 Rep. 136; Richardson v. Hughitt, 8 Rep. 177. Indeed, it has been maintained that the American cases, generally, have never gone to the same extent as the earlier English cases. Eastman v. Clark, 53 N. H. 276.

Some of the cases above cited are stronger than the case at bar. Bullen v. Sharp is such a case. In Mollwo March & Co. v. Court of Wards, the borrower agreed to carry on the business, subject to the control of the lender in several particulars, and to pay the lender twenty per cent. of the profits until the advances were repaid with twelve per cent. interest, and yet it was held that no partnership was created, the primary purpose being security for the loan. In Polk v. Buchanan the lender was to have one-fourth of the net profits for his accommodations, which were to continue for two years, and to have the product of the business placed under his control, and yet he was held not to be a partner. In Williams v. Soutter, it was held that a loan of $2,000, to be repaid at the expiration of a year, with interest at the rate of thirty per cent. or one-third of the net profits of the business, did not make the lender a co-partner with the borrower. In Cox v. Hickman, Lord Chief Baron Pollock supposes, as a case in which a partnership would clearly not exist, the case of a loan to be repaid by the application of one half the profits as they might arise, the lender to have the power to see that the profits were applied. If these cases are law, we do not see how it can be held that a co-partnership would result from carrying out the contract in the case at bar.

In Pooley v. Driver, L. R. 5 Ch. Div. 458, 474, 488, there was an agreement by the recipients of the accommodation to carry on the business "to the best of their ability." The court relied on this, in connection with other features of the contract, to show that a partnership was in reality created under the cover of a loan. For the law will not tolerate any evasion, but wherever the agreement creates as a matter of fact the relation of partnership, no mere words to the contrary will prevent, as regards third persons, its having its legitimate consequences. *Ex parte* Delhasse, L. R. 7. Ch. Div. 511. In the case at bar, however, we find no reason to suspect any latent design to create a partnership under the disguise of a loan; for though there is here, as in Pooley v. Driver, an agreement on the part of the borrower to carry on the business to the best advantage, we do not think it affords any inference that a partnership was intended; for it is scarcely more than the law itself would require, namely, that the borrower shall conduct with good faith, and it is certainly less significant than the stipulations given in some of the cases above cited. And see *Ex parte* Tennant, L. R. 6 Ch. Div. 303. The lenders make it a condition of the loan that the borrower shall carry on the business to the best advantage, because they are dependent on him, the business being his and not theirs.

The plaintiff contends that there is a distinction between an agreement for participation and

actual participation, and that while the former may be only *prima facie*, the latter is conclusive, evidence of partnership. We do not find that the distinction is well founded in either reason or precedent. It certainly is not well founded if partnership is a fact dependent on agreement, and not a mere matter of legal imputation, and, as we understand the current of modern decision, it is such a fact; and the only case in which a person, who is sought to be charged as a partner, is precluded from proving the actual fact is when he has held himself out, or permitted himself to be held out, as a partner.

The plaintiff also contends that inasmuch as participation in profits, if not conclusive, is at least *prima facie* evidence of partnership, it is for the jury to say whether the defendants are partners or not. This may be so if there is testimony outside the contract and its execution going to show the existence of a partnership. But if there is no such outside testimony, if all that the members of the firm of Mason, Chapin & Co., have done is to carry the contract into effect according to its terms, then the question is wholly for the court; for nothing done in execution of the contract could create a partnership unless the contract is itself a contract for a partnership, and whether it is or not, it being in writing, is simply a question of legal construction.

The Roman law and the modern foreign law, Judge Story says, do not create partnerships, as to third persons, between parties, without their consent, and therefore, he adds, the common law appears to have pressed its principles to an extent not required by, if it is consistent with, natural justice. Story on Partnership, sec. 37. If Judge Story were living to-day, he would doubtless rejoice to find that the common law, as expounded by the highest judicial tribunals in England, does not diverge from the Roman and modern foreign law, nor from natural justice, so widely as he had inferred from the earlier English cases. It is certainly a great advantage to have the law in harmony with natural justice. A law that no person can share in the profits of a business without becoming liable as a partner for its losses is not such a law; for it subjects men, without any fault on their part, to liabilities, as if by contract, which they never contracted. In this State there is no reported decision which is inconsistent with the later English cases, and we think the later English cases are to be accepted as the truest and most authoritative exposition of the common law.

Taking then the first question to be as previously stated, namely: Would the contract, if carried into effect according to its terms, make the parties to it co-partners or render them liable to third persons as co-partners, we answer it in the negative.

The second question arises thus: The action is *assumpsit* for goods sold and delivered. The goods were sold by contract under seal, executed May 1, 1878, by the plaintiff and the defendant Smith, and were subsequently delivered under it. The contract purports to be simply the individual contract of Smith with the plaintiff. The defendants contend that *assumpsit* can not be maintained. The question is, Can it be maintained?

Ordinarily an action of *assumpsit* does not lie for money due on a contract under seal so long as an action can be maintained on the specialty. Gilman v. School District, 18 N. H. 215; Clendennen v. Paulsel, 3 Mo. 230; Brown v. Gauss, 10 Mo. 265; Young v. Preston, 4 Cranch, 239; Pierce v. Lacy, 23 Miss. 193; Hawkes v. Young, 6 N. H. 300; Wilson v. Murphey, 3 Dev. 352; Shack v. Anthony, 1 M. & S. 573; Evans v. Bennett, 1 Camp. 300, 303, note. The reason is because *assumpsit* lies only on simple contracts, and when a contract by specialty exists, all simple contracts of the same purport are merged in it. If, therefore, the action were against Smith alone, we think it clearly could not be maintained; and of course, it can not be maintained against him and others unless they were co-partners with him. The question is, then, Can it be maintained against him and others if they were his co-partners? There is in our opinion an insuperable obstacle to it. For if he is not liable individually in *assumpsit* because he is liable on his contract under seal in the higher form of action, how can he be liable jointly with others; the cause of action, which originally came into existence under the contract under seal, remaining always one and the same? We do not see how he can, consistently with the rules of pleading or with the rule that the same cause of action can not exist at the same time as a simple contract and as a specialty. It is only in case the contract under seal could be regarded as collateral to an implied contract on the part of all the defendants that the action could lie; but it can not be so regarded because it is itself the original or principal contract, and being express leaves no room for any contract by implication. Banorgee v. Hovey, 5 Mass. 11; Kimball v. Tucker, 10 Mass. 192; Blume v. McClurken, 10 Watts, 380; Eames v. Preston, 20 Ill. 389. The plaintiff has cited numerous cases, of which the three following are most in point: Cram v. Bangor House Proprietary, 12 Me. 354; Van Deussen v. Blum, 18 Pick. 229; Fagely v. Bellas, 17 Pa. St. 67. In the first of these cases the contract was for the benefit of a corporation, but was signed and sealed by its agents with their own names and seals. It was held that an action of *assumpsit* would lie against the corporation which had received the benefit of the contract. The court appear to treat the sealed contract as if it were not binding either on the corporation or its agents, and if this was so, the decision was right beyond any question. Moreover the action was against the corporation alone and not against any person who signed the contract under seal. In the second case the action was debt, not *assumpsit*. The declaration contained, besides a special count on the contract, general counts for work done and materials furnished, and the court permitted the plaintiff to recover on the latter counts, notwithstanding the contract was under seal and signed in the firm name by only one of the partners. The case ap-

pears to have been decided without regard to the previous and thoroughly considered case of Banorgee v. Hovey, the contract apparently being considered a nullity, whereas it was, according to the precedents, the deed of the partner who signed it. The case of Fagely v. Bellas is directly in point, but it is a mere decision without reasons assigned or precedents cited. We do not think these cases ought to control our decision. The contract here was executed by Smith in his own name, and there can be no doubt that he is individually bound by it. There are cases which hold that where the partner who executes the obligation is insolvent, the other partners may be reached in equity, there being no remedy against them at law. Purviance v. Sutherland, 2 Ohio St. 478; Linney v. Dare, 2 Leigh, 588; Sale v. Dishman, 3 Leigh, 548; Weaver v. Tapscott, 9 Leigh, 424, 426; James v. Bostwick, Wright (Ohio), 142; Wharton v. Woodburn, 4 Dev. & B. 507. These decisions rest on the assumption that at law an action will lie only on the specialty. And we think if there is any remedy against the non-executing partners it is in equity.

We think, therefore, there being no claim that the goods were furnished otherwise than in fulfilment of the contract under seal, without any variation or abandonment of it, that the plaintiff can not maintain an action of *assumpsit*.

The plaintiff must, therefore, agreeably to the agreement, become nonsuit, and judgment must be entered for the defendants for their costs.

ABSTRACTS OF RECENT DECISIONS

ENGLISH, IRISH AND CANADIAN CASES.

MALICIOUS PROSECUTION—SUFFICIENCY OF DEFENSE.—In an action for malicious prosecution, it appeared that the plaintiff was committed for trial on a charge of arson, upon the information of the defendant and another witness. The latter alone deposed to the plaintiff being concerned in the commission of the offense. The defendant only swore as to the fact that the premises were burned, which was admittedly true. The informations were sent in due course to the Crown Solicitor of the county where the offense was alleged to have taken place, and the prosecution was taken up and conducted by the Crown. The defendant was an active witness for the prosecution, and from him chiefly was obtained the information required by the Crown in carrying on the prosecution. It did not appear that, in the interval between the plaintiff's committal and the trial, the defendant had acquired a knowledge of any facts not previously known to him which would influence his opinion as to the faithworthiness of the principal witness in support of the charge. *Held*, that a belief by the defendant, upon reasonable grounds, in the guilt of the plaintiff at the time the case was sent for trial, was a sufficient defense to the action, although such belief might not have in fact continued up to the trial of the plaintiff upon the criminal charge; and that, if the defendant had formed upon reasonable grounds a belief in the plaintiff's guilt, and such belief continued up to the date at which the prosecution was taken up by the Crown, and the defendant thereby lost all dominion over it, although the defendant afterwards changed his opinion as to the truth of the charge, no duty lay upon him towards the plaintiff to inform the public prosecutor of the alteration in the opinion which he had previously entertained.—*Duane v. Barry*. Irish Court of Exchequer. 4 L. R. Ir. 742.

CONTRACT—CONDITION PRECEDENT—GUARANTEE — EMBEZZLEMENT BY SERVANT — PROSECUTION.—By an agreement and a policy of insurance the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of £1,000, which he might sustain by reason of any such fraud or dishonesty of A in connection with his employment by the plaintiff, as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty, as aforesaid, which he shall have committed, and, in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or his estate of any money which the company shall have become liable to pay." *Held*, by Lords Blackburn and Watson (Lord Selborne, C., diss.), that the prosecution of A for embezzlement was a condition precedent to the plaintiff's right of action upon the policy. Judgment of the Court of Appeal in Ireland reversed.—*London Guarantee Co. v. Fearnley*. English House of Lords, 28 W. R. 893.

STATUTE OF FRAUDS—WITHDRAWAL FROM PROSECUTION—PUBLIC POLICY—LARCENY BY BAILEE—DEPOSIT OF DEEDS.—1. An agreement to charge hereditaments with the value of property which has been lost through the wrongful act of a third person must be in writing, as being within the 4th section of the Statute of Frauds, but it may be taken out of the statute by a deposit of title-deeds. 2. An agreement to withdraw from a prosecution for larceny by a bailee, or for any other felony, or any misdemeanor of a public nature, with a view to private benefit, is bad, as being against public policy; and it does not matter whether the proposal for the withdrawal proceeded from the prosecutor, or from the accused person or his friends; nor whether the terms of withdrawal were or were not sanctioned by the judge at the criminal trial; nor whether the conduct of the accused person was or was not such as to give rise to a right of civil action. 3. Where such an agreement is declared to be invalid, a party who deposited deeds for the purpose of securing the agreement being carried out is entitled to have them returned to him.—*Whitmore v. Farley*. English High Court, Chy. Div. 28 W. R. 908.

NOTES OF RECENT DECISIONS.

SEDUCTION — REQUISITES OF INDICTMENT FOR.—A statute in relation to seduction provides as follows: "Any unmarried man who, under promise of marriage, or any married man, who seduces and has illicit connection with any unmarried female of previous chaste character, is guilty of a felony." An indictment under this statute alleged that G, on May 11, 1878, seduced one H under promise of marriage, she "being then an unmarried female, of chaste charac-

ter, previous to the date of said promises, and of chaste character previous to the said 11th of May, 1878." *Held*, that the indictment was bad. The woman must have been, at the time of the act of seduction, of previous chaste character; that is, she must have been of chaste character immediately previous to the act. Such character must have continued down to the time of the seduction. It is not enough that her character was chaste down to some time prior to that of the seduction, which is all this indictment alleges; for, though chaste previous to the promises to marry she may have become unchaste after such promises, and before the act of seduction, and though chaste at all times previous to the 11th day of May, she may on that day, and before the alleged seduction, have become unchaste. The indictment does not state all the facts which constitute the crime of seduction.—*State v. Gates*. Supreme Court of Minnesota. Opinion by GILFILLAN, J. Judgment reversed.

FIXTURES—WHEN MACHINERY IN FACTORY FIXTURE AS BETWEEN VENDOR AND VENDEE.—Where the machinery in a factory is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. See Green v. Phillips, 6 Gratt. 752. B, to secure a debt of $3,000 for money lent to him by S, conveyed to C, in trust, a lot of land in the town of F, described as containing one acre of land on which B has erected a planing mill and spoke factory; and by the same deed he conveyed and assigned to C a policy of insurance he had taken out on the said planing mill, spoke factory and machinery, and covenanted to keep the policy in full force until the debt was paid. The lot and building independent of the machinery was not worth more than $1,000. *Held*, that the machinery in the building passed under the deed.—*Shelton v. Ficklin*. Supreme Court of Appeals of Virginia. Opinion by CHRISTIAN, J. Judgment affirmed.

INTOXICATION—MAY BE SHOWN IN ORDER TO DETERMINE DEGREE OF CRIME.—Whilst vo luntary intoxication is no defense to the fact of guilt, yet where the question of intent or premeditation is involved, evidence of it is admissible for the purpose of determining the precise degree of the crime. And in all cases where the question is between murder in the first and second degree, the fact of the prisoner's drunkenness may be proved to shed light on mental *status*, and thereby enable the jury to determine whether the killing was from a premeditated purpose, or from passion excited from inadequate provocation. But caution is necessary in the application of the doctrine, as there may be many cases of premeditated murder, in which the prisoner previously nerves himself for the deed by liquor. In such cases as these, drunkenness is entitled to no consideration in favor the prisoner in determining the degree of his crime, but on the contrary tends to elevate the offense to murder in the first degree. Com. v. Jones, 1 Leigh, 598; Pirtle v. State, 9 Humph. 663; Swan v. State, 4 Id. 136; Boswell v. Com., 20 Gratt. 860.—*Willis v. Com*. Supreme Court of Appeals of Virginia. Opinion by ANDERSON, J. Judgment affirmed.

INDICTMENT—FORMER CONVICTION — PLEADING. —1. The defendant committed a violent assault upon one George Morton on the 3d day of March, 1879, and on the 4th day of March was prosecuted before the municipal court of Lewiston, and convicted of assault and battery. On the 23d day of March said Morton died of the injuries inflicted by the defendant, and the defendant was thereupon indicted for manslaughter, and when arraigned pleaded the former conviction of assault and battery in bar. *Held*, that the plea was no bar to the indictment. 2. The general rule is that if the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second. To this general rule there is this exception. When after the first prosecution a new fact supervenes, for which the defendant is responsible, which changes the character of the offense and together with the facts existing at the time constitutes a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. 3. While the defendant under the statute may be convicted on this indictment of assault and battery, on failure of proof that death resulted from the injuries inflicted, still he may protect himself from being twice in jeopardy for that offense by pleading in bar the former conviction of the crime of assault and battery embraced in the indictment and not guilty of manslaughter, and then if convicted of manslaughter he shall have judgment therefor. If acquitted of manslaughter he shall have the benefit of his plea in bar as to assault and battery.—*State v. Litchfield*. Supreme Court of Maine. Opinion by LIBBY, J. Judgment affirmed.

SUPREME COURT OF RHODE ISLAND.

May, 1880.

CO-EXECUTORS — LIABILITY FOR ACTS OF EACH OTHER.—1. Each one of several co-executors has full power of administration. 2. A and B were executors of an estate. A made collections and squandered the receipts. Whereupon C, a debtor of the estate, agreed with B to make no payments to A except upon orders bearing B's signature. A subsequently presented an order signed by himself as executor, and bearing a signature of B forged by A. C in good faith paid this order. In an action by B against C to recover the balance due to the estate: *Held*, that the payment by C made on the order bearing A's genuine signature and B's forged signature was valid. Affirmed. Opinion by DURFEE, C. J.—*Stone v. Union Savings Bank*.

ACTION FOR INJURY CAUSING DEATH—CONSTRUCTION OF STATUTE.—1. Gen. Stat. R. I. ch. 193, sec. 21, provides: "In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of his or her husband, widow, children or next of kin, in like manner, and with like effect, as in the preceding five sections provided." *Held*, that this section gives no action against a defendant who is only charged with passive neglect or a mere omission of duty. 2. F owned and for purposes of repair controlled a yard occupied by a tenant. In the yard was a cistern on which F had put a proper iron cover. This was removed without the knowledge of F, and a wooden cover weighted with a stone but claimed to be insecure was substituted. A child three years old living in a tenement, the yard of which was contiguous to F's yard and connected with t by an open gateway, fell into the cistern and was

drowned. In an action by the administrator of the child against F, brought under Gen. Stat. R. I. ch. 193, sec. 21: *Held*, that F was not liable. Affirmed. Opinion by DURFEE, C. J.—*Bradbury v. Furlong.*

TROVER AND CONVERSION — LIS PENDENS. — 1. Pending a bill in equity affecting the title of realty, third persons with the consent of the respondent cut, carried off, and appropriated quantities of wood and brush from the realty in question. After a decree in his favor the complainant filed another bill in equity against these third persons to ascertain the amount of stuff cut and carried off by them, which was charged to be of the value of $500, and to enforce payment from them. This bill charged no conspiracy with the former respondents, nor any attempt to commit actual fraud. The respondent demurred. *Held*, that the bill was virtually an action of trover and conversion for wood cut pending the former bill, and could not be maintained. 2. The doctrine of "*lis pendens*" requires property specifically sued for to abide the result of the suit. The doctrine can not be extended to support a bill in equity which, neglecting the specific property, seeks only to recover its value. Bill dismissed. Opinion by DURFEE, C. J.—*Gardner v. Peckham.*

LIQUOR LAWS—REQUISITES OF INDICTMENT FOR UNLAWFUL SALE OF LIQUOR.—1. A criminal complaint for the unlawful sale of liquor charged the defendant with unlawfully selling on a day given "without license first had and obtained." *Held*, that these words sufficiently charged the want of license to sell when the sale was made. 2. A complaint for unlawfully selling liquor need not aver the price paid for the liquor nor the residence and occupation of the purchaser. Authorities cited: As to the question of license: Edwards v. State, 22 Ark. 253; Bolaue v. Randall, 107 Mass. 121; Kadgihn v. City of Bloomington, 58 Ill. 229; Com. v. Bryden, 9 Met. 137; Com. v. Baker, 10 Cush. 405; Com. v. Dunn, 14 Gray, 401; Lord v. Jones, 24 Me. 439; Com. v. Doherty, 10 Cush. 52; Com. v. Bugbee, 4 Gray, 206: State v. Price, 11 N. J. Law, 203. As to the question of price: Com. v. Bryden, 9 Met. 137; Com. v. Baker, 10 Cush. 405; Com. v. Dunn, 14 Gray, 401; Kilbourne v. State, 9 Conn. 560; State v. Reed, 35 Me. 489; State v. Fuller, 33 N. H. 259; State v. Munger, 15 Vt. 296; State v. Whitney, 15 Vt. 298; People v. Adams, 17 Wend. 475; People v. Gilkinson, 4 Park. Cr. 26; Cannady v. People, 17 Ill. 158; Hintermeister v. Iowa, 1 Iowa, 102; State v. Ladd, 15 Mo. 430; State v. Miller, 24 Mo. 532; State v. Fanning, 38 Mo. 359; State v. Melton, 38 Mo. 368; State v. Rogers. 39 Mo. 431; Hare v. State, 4 Ind. 241; State v. Murphy, 8 Blackf. 498. As to the description of the purchaser: Cotton v. State, 4 Tex. 260; State v. France, 1 Overt. 434; State v. Black. 31 Tex. 560; State v. Bell, 65 N. C. 313; State v. Anderson, 3 Rich. 172; State v. Brite, 73 N. C. 26: State v. Henderson, 68 N. C. 348; State v. Doyle, 11 R. I. 574. As to the uncertainty of the complaint: United States v. Claflin, 13 Blatch. C. C. 178; Regina v. Mansfield, 1 Car. & M. 140. Exceptions overruled. Opinio PER CURIAM.—*State v. Hines.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1880.

DEFECTIVE HIGHWAY—LIABILITY OF TOWN—EVIDENCE.—1. The intention of the statute of 1877, ch. 234, limiting the liability of towns, etc., for pesonarl injury or damage to property caused by defects in a highway to such cases where the defect might have been remedied, or the damage or injury might have been prevented, by reasonable care and diligence on the part of said towns, etc., obliged by law to repair the same, is to protect towns from liability where there has been no lack of proper diligence on their part. 2. Where, therefore, it appeared that after a storm of unusual violence, the cross-roads of the town of R were much obstructed by snow-drifts, in passing one of which the plaintiff's carriage was overturned; and the surveyor of highways testified that after the storm he broke out the street where the accident happened in the usual manner, and finding drifts badly driven across it by the north wind, he cleared a track ten feet wide so as to be safe for travel, but so far as possible avoiding the drifts; and in order to show that this manner of clearing the road was reasonable, and that permitting a partial obstruction of the road-way by snow-drifts did not, under the circumstances, create a defect which the town could have remedied by reasonable care and diligence, the defendants offered to show the actual cost of clearing the roads in said town after that storm, with the estimated cost of clearing them, if a way for travel had been opened along the middle of the road-way regardless of drifts, together with the town valuation, and the amount expended each year for the repair of roads, which evidence the court excluded, it was *held*, that the evidence offered was competent. The whole matter of alleged negligence is for the jury, and must necessarily be affected by the expense which has been incurred or which would be required by the method proposed with reference to the resources of the town to meet such expense by taxation. Opinion by COLT, J.—*Rooney v. Inhabitants of Randolph.*

LORD'S DAY ACT—SUNDAY TRAVELING—DEFECTIVE HIGHWAY.—Under the statute making it unlawful and criminal to travel on the Lord's day, except from necessity or charity, a plaintiff, who, after driving out on that day to attend a funeral, has received injuries through a defect in a highway, while deviating upon his return for the purpose of enabling a companion to make a social call upon a sister-in-law whom she had not called upon for several years, can not maintain an action against the city by law required to keep such highway in repair. Opinion by AMES, J.—*Davis v. Sommerville.*

WILL — DEVISE — REMOTENESS.—A testator devised certain real estate to trustees in trust to pay over the income, deducting expenses, to his daughter, N, during her life; "and upon this further trust, upon the decease of said N, to pay over to her daughters, A and M, the net rents and income of" a portion of said estate "during their lives; and on the decease of said A and M, successively, to convey in fee, or in case said estate should be sold, pay over and distribute the proceeds to and among the heirs at law of said A and M; and on this further trust, upon the decease of said N, to pay the net income of" a portion of said estate "to her children during the lives of said children. And as the children of said N shall successively decease, said" last named portion "to be conveyed in fee, or in case the same be sold, the proceeds to be paid and distributed to and among the heirs at law of all the children of said N—that is to say, that as said N's children shall successively decease, a proportion of said estate or the proceeds are to be conveyed or distributed to and among the respective heirs at law of each child so deceasing, said N's grandchildren to take in right of representation of their deceased parents." *Held*, 1. That the limitation over of the fee to the heirs at law of the children of N was void for remoteness, as including children born after the death

of the testator. 2. The question of remoteness must be determined by the possibility, and not the probability, that N might have after-born children. 3. That the estate so limited passed under the general residuary clause of the will, and the fact that certain remainders and reversions were specified as included in said clause would not limit or narrow it. Opinion by MORTON, J.—*Lovering v. Lovering.*

PROMISSORY NOTE — PRESENTMENT— PAYMENT UNDER MISTAKE OF FACTS.—Where the maker of a promissory note, at the date of its maturity, occupied a house in the town of K, and had had a place of business there, but did not have any there on that day; and the note itself did not specify any place of payment; and the notary to whom the note was delivered for protest by the M. National Bank, to which it had been sent for collection by the defendant bank, presented the note for payment at the M. National Bank, and at the store formerly occupied by the maker, but made no other effort to find the maker, and sent the plaintiffs, who were indorsers of said note, a notice of dishonor; and the plaintiffs relying upon said notice, and upon a claim made by the defendant bank that they were liable, paid said bank the amount of said note, it was *held*, that the note was payable at the maker's house; that the presentment made by the notary was not a good presentment; that the note, therefore, was not dishonored, and the plaintiffs were discharged from all liability as indorsers; that the payment was made under a mistake of fact, and that they were entitled to recover the amount so paid; and that as no demand was shown to have been made before the bringing of this suit, interest on the amount so paid was only recoverable from the date of the writ. Opinion by SOULE, J.—*Talbot v. Nat. Bk. of the Commonwealth.*

INSANE PERSON—EXPRESS CONTRACT — IMPLIED CONTRACT.—Where the defendant, an insane person, was received by the plaintiff as an inmate of its asylum, on the certificate of two physicians that she was insane, to which was appended an application for her admission signed by the keeper of the hotel at which she was boarding, together with an agreement signed by one T and one W that they would pay her board as long as she remained there, and all expenses incurred in clothing her, providing things proper for her health and comfort, and remove her when she was discharged, in which proceedings she took no active part, it was *held*, that the plaintiff having received her under the express contract with T and W to pay the plaintiff, there was no implied contract on the defendant's part to pay anything for her board and support. Metcalf Cont. 6; Whiting v. Sullivan, 7 Mass. 107. Opinion by SOULE, J.—*Mass. General Hospital v. Fairbanks.*

LORD'S DAY ACT — LIABILITY OF OWNER OF DOG.—In an action of tort, under Gen. Stat., ch. 88, sec. 59, to recover double the amount of damage alleged to have been caused by defendant's dog, it appeared that the plaintiff, on a Sunday, was driving his horse and buggy along a public highway, when the defendant's dog jumped at the head of plaintiff's horse and frightened said horse so that he became unmanageable, ran and overturned said buggy, occasioning the injuries complained of. *Held*, that the plaintiff's act of traveling had no tendency to produce the assault or consequent injury; and, therefore, though he was traveling in violation of the Lord's Day Act, it would not defeat his right of recovery. Opinion by MORTON, J.—*White v. Lang.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

37, Is an ordinance of a village in Illinois, incorporated under the general laws of the State, which provides a fine of not less than $50 nor more than $200 and imprisonment in the calaboose of said village of not less than ten nor more than thirty days for each and every sale of intoxicating liquors, legal? Can a justice of the peace imprison as a part of the penalty or punishment?
Streator, Ill. B.

38. A died intestate and indebted to C, leaving D his heir. E administers on the estate of A, and by an order of court sells certain lands, which sale by some irregularity is void. D brings suit in ejectment to recover said lands. Will a court of equity subrogate the purchaser of the lands to the original rights of C? W. L. A.
Quincy, Ill.

39. The Constitution of Arkansas provides that: "In civil actions no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried; provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." *Query*—In a bill for foreclosure brought by the assignee of the mortgage after the death of the mortgagee, is the mortgagor a competent witness, under this provision, to prove payment of the mortgage debt to the mortgagee in his lifetime, or to impeach the consideration of the mortgage note? And if he is, is his uncorroborated testimony sufficient for either purpose? A. B.
Ft. Smith, Ark.

ANSWERS.

31. [11 Cent. L. J. 178.] It is a general principle that goods in custody of law can not be attached. Drake on Attachment, 251. In replevin, though in plaintiff's possession, property is regarded in *custodia legis*. Wells on Replevin, 470 and 478. Would have remedy by injunction as in other cases. L. H. J
Oregon, Mo.

32. [11 Cent. L. J. 178.] The Virginia statutes of 1776 and 1785, docked estates tail, giving to tenant or donee in tail an estate in fee-simple. *Held*, to bar all remainders, vested and contingent, that were limited upon the estate tail, which was converted into a fee simple. And where a remainder, upon an estate tail was limited in a devise, it was held that it could not be allowed to escape the operation of the act by construing it as as an executory devise, instead of a remainder as it was in the terms of its creation. Carter v. Tyler, 1 Call, 165; 1 Leigh, 404-418; Lomax' Digest of the Laws of Real Property, vol. 1, page 25; Ibid, vol. 2, page 225. But the statute law was changed in 1819 so as to permit every limitation upon the constructive fee simple, "if the same would be valid when limited upon an estate in fee simple created by technical language." H. B. L.
Albany, Mo.

CURRENT TOPICS.

The case of the Chinaman's Tattoo Marks (Ah Chuey v. State, 11 Cent. L. J. 111) seems to have attracted a good deal of attention among our readers. Our criticism of the decision (11 Cent L. J. 166) has resulted in two cases somewhat in point, both of them new to us and one unreported, being brought to our notice through the courtesy of correspondents. One of them is from Louisiana where the court apparently impressed with the main argument used in Ah Chuey's Case, says: "The tracks of the murderer were found near the scene of the murder, and to enable the witness who saw the tracks to state how they corresponded in size with the feet of the prisoner, he was forced to take his feet from under a chair where he had put them. This the prisoner's counsel calls forcing him to give evidence against himself. A mere statement of the facts shows how utterly untenable the objection is. The witness was required to look at the feet of the prisoner in order to testify to facts which might enable the jury to connect the prisoner with the perpetrator of the crime, and we are unable to perceive how any constitutional right of the prisoner was infringed by compelling him to place his feet where they could be seen by the witness and the jury." State v. Proudhomme, 25 La. Ann. 523. In the other case the provision the Constitution of Georgia that "no person shall be compelled to give testimony tending in any manner to criminate himself," received the following interpretation by the Supreme Court of Georgia, through Warner, C. J.: "The defendants, Whit Day and Jesse Slayton, were jointly indicted for the offense of burglary in the nighttime. * * * * The evidence mainly relied on for the conviction of the defendants was certain tracks which were similar to those made by the defendants, found near where the burglary was alleged to have been committed. * * * * Allen, a witness for the State, testified in relation to Slayton, the other defendant, that he was stubborn, did not want to put his foot in the track, said he was innocent of the charge. Witness took hold of him, pulled him along, and then put his foot in the track; witness took hold of his foot and put it in the track; he did not consent to it; the shoe fitted the track. This evidence was objected to by the defendant, the objection was overruled, and that is one of the errors assigned. By the Constitution of this State no person shall be compelled to give testimony tending in any manner to criminate himself. Nor can one, by force, compel another against his consent to put his foot in a shoe track for the purpose of using it as evidence against him on the criminal side of the court." Day v. State, decided Nov. 1879, and not yet reported.

The *Law Times* notices the case of *re Arthur's Estate* recently decided by the Master of the Rolls, where a point of law arose which gave rise to considerable nicety of argument. A testator by an ante-nuptial settlement dated Aug. 1873, bound himself, on or before the 2nd July 1875, to take out and effect a policy of insurance on the full term of his life, in the name of trustees, for £10,000. On the 1st July 1875 he became so ill as to be unable to insure his life, and continued in the same state of ill-health until the date of his death, in Sept. 1878. The trustees of the settlement then claimed to have the value of the policy paid them out of the deceased's estate, but their claim was resisted by his creditors. It was argued on behalf of the latter, that the covenant entered into by the deceased, though absolute in terms, contained an implied condition that his life would be insurable at the date mentioned in the deed, and was in this respect analogous to covenants entered into for personal service, where the principle was that the contract contained an implied condition that the person whose services were stipulated for should be alive or fit to perform them. This was the principle recognized in Arabella Goddard's Case (Robinson v. Davidson, 24 L. T. R. N. S. 755), where the pianiste, having entered into an engagement which she was compelled to break by reason of ill-health, was held not to be liable in damages. The same principle, too, has been recognized in cases where a master had sued the father of an apprentice who was too ill to work, and where a schoolmaster had sued a father whose son had absented himself by reason of ill-health, although the contract was to give a quarter's notice. The Surrey Music Hall and Gardens Case was also cited (Taylor v. Caldwell, 8 L. T. R. N. S. 356), where the defendant covenanted to let his music hall at a future time, and before the time arrived the hall was burnt down, and it was held, in accordance with the maxim *lex non cogit ad impossibilia*, that the defendant was not liable for that which was no fault of his. For the trustees it was contended that the covenant was intended as a mode of providing for the children of the marriage, and did not contemplate the doing of a particular thing under particular circumstances only, and that the deceased, having an interval of time given him during which he was able at any time to perform the covenant, chose to run the risk of putting off insuring his life until the last day open to him, and therefore his estate must bear the consequences of his negligence. The Master of the Rolls held that the covenant was absolute, and that there was no excuse for its non-performance. The parties must have known that life and health were always liable to fail, and when it was considered that there were particular offices who would insure—at properly proportioned premiums — almost the feeblest lives, it must be thought that the extremely exceptional case of non-insurability could not have been so absolutely outside the contemplation of both parties as to nullify a claim for damages. He held, therefore, that the trustees were right in their claims for damages, and that the amount of damages was the sum required to be paid on the 2nd of July, 1875, for a policy of £10,000 free of premiums on a good life of the same age as the deceased.

CORRESPONDENCE.

LAWYERS' FEES.

To the Editor of the Central Law Journal:

We read constantly in the papers of lawyers receiving large fees for professional services, and people get an idea that the legal profession offers sinecures to most men who enter it. What an idea! It seems to us that there is no profession which is more overworked, and which receives the least returns for that work, than the legal profession. In most cases the men who do receive large fees deserve them. The exceptions are rare. Lawyers as a class are proverbially poor. Those who make money the sole object of their ambition have no business in the profession. The law is not a field for money-making, and it may as well be known at the start. "Mere money-making," says Judge Redfield, "except as the natural result of pro-

fessional advancement, mere political office, however high, he will regard as things not to be listened to for a moment, as base and degrading bribes, which a true man should spurn with the same loathing which he would an attempt to corrupt his faith or his honor." We once heard an old lawyer say that it was dangerous for a young man to make money at first, and while we would like to risk it ourselves, we do believe there is a great deal of truth in the remark. Lawyers as a rule are underpaid for their work, and when the amount of gratuitous work they do in the course of a life-time is considered, there can be no doubting it. A member of a prominent legal firm not a thousand miles away, used to say to some of his clients, "We are not an eleemosynary institution," but they seldom went elsewhere.

We don't believe in "cutting" fees; they are already low enough; and if there should be a change, they ought to be raised. In England, conveyancer's and pleaders' fees are in a great measure fixed by statute, much as those of the officers of our courts of record here; but the practice of an American lawyer is elastic, and his fees appear to be equally so, according to circumstances. And so it has come to be a popular notion with laymen that it is much the same in the law as in trade. You can bargain with your lawyer as you can with your green-grocer and tailor. The lawyer understands the value of his services, and should be allowed to fix it at his own standard. It may be a question whether it is possible to estimate beforehand the value of those services. Circumstances may, often do, arise, which may affect very materially the disposition of a case, and it would not be prudent to make any special contract with reference to the fee to be paid.

Travelers in Italy never think of offering a tradesman what he asks for his wares, for they can generally purchase them for half the amount originally asked. And in a certain American city where building associations flourish as a green bay tree, and poor mechanics are deluded into the notion that there is honor among—trustees, the services of starving attorneys are secured by a system of bidding—the principle being that the lowest bidder gets the place. The main qualifications for the position we understand consist in the mechanical ability to make and examine a title to property and conduct a suit in a squire's court. This system of rivalry, they say, has resulted in reducing professional fees in such associations to a mere nominal figure. This was "cutting" it down pretty fine, but there were found competitors for the race. There are cheap attorneys just as there are cheap tradesmen. We remember a case in point: An old gentleman who recently died, hired a cheap attorney to manage his estate after his death. As a result his heirs were involved in a most useless litigation and suffered unnecessary losses.

To say that lawyers are well paid as a rule is untrue. And as for our judges, it is a source of universal complaint that they are the most poorly paid of any judges in the world. We do not remember at present the salaries of the French or German judiciary, but there can scarcely be a doubt that they fare better than their American brethren. Comparing the salaries of the judges of our United States Supreme Court or Circuit and District Courts with those of the judges of the Supreme Court of England, we find an immense difference in favor of the latter. The salary of the Chief Justice of the King's Bench in 1825 was £10,000 a year, which was reduced in 1851 to £8,000. Those of the Baron of the Exchequer and of the Common Pleas were then fixed at £7,000 a year. Retiring pensions are given to these judges in England. We do not understand that the superannuated judges of our own Supreme Court are pensioned by the government. The retiring pension of the Chief Justice of the Queen's Bench is fixed at £4,000 a year; those of the Chief Baron of the Exchequer and Common Pleas at £3,700 a year. (Campbell's Lives.) The same may be said of other official positions held by the legal profession in that country. The salary of attorney-general in the time of Lord Coke was £81, 8d, but his official emoluments amounted to £7,000 a year. The salary of the chief justice at that time was £258, 8s. 9d. with correspondingly large emoluments, while the gifts to the lord chancellor in Lord Cowper's day at New Years amounted to £3,000. Lord Eldon's income from his profession from 1786 to 1798, during the most of which time he was either solicitor or attorney-general, ranged from £7,000 to £11,000. As for the incomes of eminent lawyers, Lord Tenterden's practice at the bar before he became chief justice was estimated at £10,000 a year. His income from his profession even exceeded Erskine's in his best days, and yet Tenterden is said never to have addressed a jury in London in the whole course of his life. Erskine received two bank-notes of £500 each as a fee for one of his earliest cases, the principal part of which consisted in writing a speech which his client delivered as his own production—Admiral Lord Keppel, who was charged with incapacity and misconduct in battle. The admiral was honorably acquitted. Lord Mansfield's income from his estates after his retirement from the bench, was £30,000, most of his money being invested in mortgages.

The incomes of present eminent English lawyers from their practice are said to be even greater than these amounts, and yet it can not be said that such men are over-paid. Their lives have been spent in hard work and self-sacrifice from the start, and it is only in old age after all that success is reached.

Cincinnati, Ohio. W. H. W.

NOTES.

——Lawyers are wont to complain pretty generally just now of lack of business, but it may be comforting to know that things are not as bad as they were three centuries ago in the reign of Queen Mary. In Stow's Chronicle, the following quaint picture is drawn of the state of the courts of law in 1557: "This yeere, in Michaelmas term, men might have seene, in Westminster Hall, at the King's Bench bar, not two men of law before the justices. There was one named Fostar, who looked about and had nothing to do; the judges likewise looked about them. In the Common Pleas no more serjeants but one, which was Serjeant Benlowes, who looked about him. There was elbow room enough; which made the lawyers to complain of their injuries at that term."

——A correspondent writes that Lord Campbell's remarks in Bright v. Legerton (see *ante*, p. 139:) "It has been beautifully remarked with respect to the emblem of Time, who is depicted as carrying a scythe and a hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed," were borrowed from Plunket, who said: "Time is the great destroyer of evidence, but he is the great protector of titles. He comes with a scythe in one hand to mow down the muniments of our possessions, while he holds an hour-glass with the other from which he incessantly metes out the portions of duration which are to render those muniments no longer necessary."